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Preliminary DISCUSSION ROUGH DRAFT and OUTLINE
for distribution for comment to members of the
Federal Bar Association Federal Contracts Committee

Comments, suggestions, objections, additions, examples, will be welcome

A RESTATEMENT OF BASIC GRANT PRINCIPLES

By MALCOLM S. MASON and PAUL G. DEMBLING
Reporters for the Federal Grants Committee of the Federal Bar Association
EDWARD SHARP, Chairman

"**What's Broke**?"

A. Lack of appropriate definitions
B. Self-defeating goals
C. Unnecessary and inappropriate variation
D. Failure to set appropriate default conditions
E. Self-defeating administration
F. Insufficient support for informed appeals processes and alternative dispute resolution
G. Uninformed decisions
H. Unnecessary fragmentation

These points will be explained in the following restatement of normal appropriate grant rules along with suggestions on "How to Fix It."

1. What is a grant?

31 U.S.C. 6304

A federal grant is federal assistance in money or property made to encourage an activity (often to encourage the continuance of an activity) of the recipient.

Example: The Department of Health and Human Services ("HHS"), as authorized by a federal statute, gives Wyoming $5,000,000 to assist in Wyoming's provision of medical services to needy residents. The amount furnished is calculated by a formula (established by the legislation authorizing the program) applied to the amount Wyoming expects to pay for such services, subject to later accounting and adjusting of the amount actually paid. That is a grant. It is often called a formula grant. By statute, Wyoming, if its program qualifies, is entitled as of right to

receive this federal assistance. The grant is therefore also often called a mandatory grant and sometimes an entitlement grant.

Example: The National Science Foundation ("NSF"), as authorized by statute, invites proposals for research projects related to communications security. Among the projects proposed is one to investigate whether the set of numbers defined by sum of 1 and the product of the first n primes yields a finite or an infinite set of non-primes and whether it yields a finite or an infinite set of primes. (Factoring is the basis of many encryption systems). The NSF awards the University of Alaska $100,000 to assist this research to be conducted by Professor A. and a graduate student. That is a grant. It is sometimes described as a direct, or discretionary, or project grant. The university, notwithstanding the merits of its proposal, does not have an entitlement to the grant. The NSF may, in its discretion, make or not make the grant, and (unless the governing statute otherwise directs) determine the size of the award, within the limit of its budget.

Comment: Often, but not always, the awarding agency may furnish, in addition to money (or sometimes property) technical assistance of its own experts. Arrangements under personnel rules that authorize agencies to furnish (e.g., to universities) services of agency employees, although very similar to grants, are generally not treated as grants, but as resource agreements.

2. **What is a Public contract?**

A public or government contract is an arrangement by which the federal government acquires goods or services for its own needs. Occasionally, the government may also sell goods or services.

31 U.S.C. 6303

Example: The Bureau of Engraving invites bids to supply "X" tons of paper meeting certain specifications by a certain date to be used in the printing of $20 bills, and awards a contract to the lowest responsive responsible bidder. That is a contract.

Another Example: The General Services Administration invites bids to supply 1,000 desks meeting certain specifications suitable for a GS-14 professional employee. It makes an award to the lowest responsive responsible bidder. That is a contract.

Another Example: The United States Postal Services solicits proposals for a site for a new proposed Post Office. The preferred area is within the boundaries of the Lanham-Seabrook delivery area. Site size desired is between 3 and 3.5 acres of

land. Offers must meet certain conditions. Acceptance of a proposal will make a contract. **Note**: Although the Postal Service is exempt by statute from many rules governing other federal agencies, that does not affect the characterization of this transaction.

Counter-example: The Bureau of Census invites proposals for research grants to count the population of the northern part of Michigan as part of the Year 2000 Census and makes an award to the University of Michigan. In addition to other defects in this arrangement, this would appear (absent other elements not stated in the example), to be an improper use of the grant form, but might have been validly done by contract.

3. **Fuzziness of Concepts**.

These definitions unavoidably have fuzzy edges. There are reasonably clear cases and there are borderline cases. It is not prohibited to use common sense.

There are contracts that are very much like grants. Grants in general, since in every case they should be intended to serve a legitimate federal goal, are very much like contracts. Yet, as we shall see, (especially in points 4-13 below) they have in many respects different consequences. It is therefore desirable that, as far as can be , the distinction be sharpened rather than blurred. In rare cases, it may be appropriate to use either a grant or a contract, but they are very rare.

The distinction is blurred by the existence of many statutorily authorized arrangements which are not clearly the one or the other, and do not have clear rules that are grant-type or contract-type or explicitly neither:

Among these arrangements are:

Cooperative Agreements, 31 U.S.C. 6305.
CRADAs, See "When the Wind Blows", Current Developments, 29 PUB. CONT. NEWSL. No. 4, Summer 1994, p.22
'Other transactions' Recently (Spring 1999) NGMA had a training session on 'Other Transactions'. Probably an article on the subject is forthcoming.
Agricultural challenge cost-share agreement **[CITE]**
Regulatory Allowances: e.g., Tradable Pollution Allowances and Transferable Airport Landing Seats. *Dembling & Mason*, ESSENTIALS, § 2-05.
Some arrangements for furnishing federal personnel to Universities
Defense University Research Instrumentation Program
(check the authority, awards made in Dec. 1998)

Secret Service assistance to True ID technology
(authorized about Sept. 1997: check the authority)

In general, it is recommended that the distinction be made sharper by eliminating unnecessary fuzzy cases such as Cooperative Agreements and CRADAs. In other cases, it is recommended that where there is an authorizing statute it be followed (by necessity) as the primary guide and that grant principles be looked to for default standards to fill in where statutory guidance is lacking.

4. **Some differences between grants contracts in operation**. Although it is true that federal grants can be described in terms that meet the academic definitions of contracts, in practice they have a style, procedural characteristics, and legal consequences that make them very different from federal contracts.

Compare in this respect, the status of a commissioned officer. It is easy to recognize the traditional elements of contract - offer, acceptance, consideration - but the consequences are NOT what would be inferred from a contract analysis.

Again compare the marriage relation. Offer, acceptance, consideration, but the consequences are NOT what would follow from a contract analysis. (Think, e.g., of novation, substitution, rescission by mutual agreement).

One may find in federal grants offer, acceptance, consideration, but a contract analysis is not a useful or a safe guide.

5. A. Contracts are within the implied authority of government agencies.

B. Grants must be authorized by statute.

Under the Constitution, property of the United States may be disposed of only by statute and money may be withdrawn from the Treasury only by statute. Article I, Article IV

Congress by statute, may set the eligibility for grants, the formula, if there is one, the purposes, the amount available, and may exercise oversight of the operation.

6. A. Contracts are normally subject to objective competition based, in the case of formally advertised contracts, primarily on price; in the case of negotiated contracts, on efficiency and effectiveness.

B. Grants may be subject to no competition or to a much more subjective sort of comparison of applicants, not based on price and not even necessarily on efficiency. The least qualified applicant may sometimes appropriately be preferred because it most needs help. The government may also award a grant because an existing project is of great interest to it.

7. A. Contract specifications are normally clear and the goal is to make them precise.

B. Grant specifications often and appropriately are general and vague. When they become more specific they generally do and should leave room for varying approaches and local differences.

C. Contracts can buy specific efforts or specific results.

D. In research, grants invite creative effort and serendipity. "Not all who wander are lost", Sir Harold Kroto (Nobel in Chemistry, 1996), quoting Tolkien, and adding: Predictable results are worthless (Schlumberger-Doll Scientific Sessions, October 15, 1998). Note also the immensely valuable "failures" of Michelson (Nobel in Physics, 1907), Luria (Nobel 1969), Penzias and Wilson (Nobel, 1978) cited in Mason, My Carthage, 7 Assistance Mgt. J., No. 3, Spring 1994.47 esp. at 48 and n.7.

8. Subject to No. 5, autonomy of the recipient is an essential aspect of grants.

9. A. Contracts are subject to strict rules of advertising, bidding, bid protest.

B. Grants are subject to no general rules or looser rules of advertising and application. Generally, there is no provision for protest by A if A is rejected for a grant in favor of B. ESSENTIALS, § 3.01: "See how the Fates their gifts allot/For A is happy - B's not / Yet B is worthy. I dare say / of more prosperity than A."

A qualified applicant for a grant of the mandatory type may have an entitlement, but in a grant of the discretionary type, a qualified applicant generally does not have a right to an award.

C. Contracts are dominated by the ethos of the market place: arms-length, cold, hard-boiled, most-bang-for-the-buck relations in competition for the award, in supervision and enforcement of the deal. Not always, but typically so. Their issues tend to be bloodless. DRAFTING, pp. 29-31, and nn. 7-10.

D. Grants are dominated by the spirit of assistance: Hot, enthusiastic, personalized, concrete, concerns about people, services to people with faces, names, ages, needs. When administration becomes blind to the people affected by the rules, we are likely to be seeing poor administration. About 1973, HHS proposed to shut down a nursing home that had not received approval of a plan of correction not because of its own fault but because of HHS's fault. HHS acted on the basis of a plausible but not compelling interpretation of a statute. The effect would have been to oust old, sick, and disabled people from a home they were used to and happy in. No fault of theirs. No fault of the nursing home.

E. Public contracts deal mostly with what can be counted and measured, the abstract, the impersonal, the formalized: a mile of road, a thousand desks, 10,000 feet of usable space, a million vaccinations.

F. Grant administration accepts the spirit of partnership, and grantee autonomy in place of bought and paid-for control.

10. A. The government may unilaterally terminate a contract for the convenience of the government. *G.L. Christian & Associates v. U.S.*, 160 Ct.Cl. 1, 312 F.2d 418; reh'g den. 376 U.S. 929 (1964); reh'g den. 377 U.S. 1010 (1964); *U.S. v. Corliss Steam Engine Co.*, 911 U.S. 326 (1875).

B. A contractor with the government may not unilaterally terminate a contract for the contractor's convenience. A contractor who does not perform may be subject to termination for default and consequential damages.

C. A grantee may unilaterally choose not to perform or not to continue performance. If it does, it merely sacrifices any grant assistance not already committed to the purposes of the grant.

D. The government has remedies for a contractor's failure to perform or for poor performance, including specific performance to the extent normally available in private transactions.

E. The government generally has no remedies for a grantee's failure to perform or poor performance (other than recovery of unauthorized expenditures and funds received but not committed). Specific performance is generally not available to the government as grantor, except perhaps on civil rights issues.

F. Quantum meruit may be available in contract cases.

G. It is often said that quantum meruit is not available in grant cases - (a questionable view, however). See discussion in Southern Illinois University Carbondale, HEW DAB Docket No. 78-5, Decision No. 49, October 31, 1978, esp. at 5-8.

11. A. Changes in contracts normally require consideration for the change. (Cite Economic Development example).

B. Changes in grants normally do not.

12. A. Contracts are normally for cost plus a profit (or include the contractor's calculation of hoped-for profit.)

B. Grants are normally for cost minus a cost sharing.

C. Grants normally require the grantee to supplement its own previous effort with the newly furnished government assistance and normally require the grantee to maintain the effort it has previously furnished.

D. Contracts normally do not have such requirements.

13. **Some basic rules of grant law**.

Grantees are not, by reason of the grant, arms, agents, agencies, or instrumentalities of the United States.

Grantees' torts are not federal government torts, *United States v. Orleans*, 425 U.S. 807 (1976). See Current Trends, 35 FED. BAR J-163 at 180 and n. 100.

Grantee personnel are not, by reason of the grant, federal personnel and are not subject to federal personnel rules.

Property of the grantee is not federal property. See Levin, Protecting the Federal Interest in Grant-Acquired and-Improved Property, 6. Assistance Mgt. J., Fall 1991, 1.

14. Nevertheless, if real property or personal property of a substantial and lasting value is purchased by the grantee with funds acquired from the federal government under the grant, the federal government may require that the property not be diverted from the original purpose of the grant and may retain a residual interest in the property to be asserted on termination of the grant or liquidation of the grantee.

15. The foregoing rule often leads to confused results and is sometimes counter productive, especially because it sometimes operates to discourage private sources of funding or lending. It is not required by constitutional law, and it is recommended that Congress by statute amend or clarify the rule or give more discretion to granting-making agencies, to do so.

16. The federal government retains an interest and the power to assure that the assistance it provides is used for the purposes for which it was provided and under the conditions it imposed. In Head Start, for example, agencies are required to encourage parent participation and to submit certain issues such as staff hires to a Parents Policy council. Failure to do so may be grounds for terminating the grant. *Community Action of Greene County, Inc*., HHS DAB Docket No. A-98-60, Dec. No. 1674, November 23, 1998, and see ESSENTIALS, § 1.01(a) and § 1.04(c).

17. The federal government may require financial records to be kept, and may impose on the grantee appropriate accounting rules. It is, however, undesirable that unnecessarily onerous rules be applied.

18. The grantee may be required to have independent audits and may be audited by the grantor and by the GAO.

19. The grantor may visit grantee projects to examine the program and its conformity with the grant conditions and to offer suggestions and help.

20. The grantor may require reports at reasonable intervals. In the past this practice, in itself sound, has often been abused.

21. The grantor may require that major expenditures and major program decisions which carry a danger of diverting from the planned program be subject to advance notice and approval. This has often been abused by grantors, however, and should be avoided where not necessary. In using such prior approvals, it is important to distinguish between sophisticated grantees who have proven familiarity with the rules, where they are less necessary, and unsophisticated grantees, where they may be more needed.

    Comment: The use of site visits and of advance approval has shown fluctuations. Site visits are good and (when used appropriately) should be encouraged. Advance approval may be necessary but should be restrained where not necessary.

22. Subject to all the foregoing, federal interference should be minimal. With respect to the substantive conduct of the program, the emphasis should be on autonomy of the grantee.

See Rhode Island Substance Abuse Prevention Task Force Association, Docket No. A-98-59, Decision No. 1681, March 5, 1999, esp. at 11. The Board reversed a disallowance by the grantor, Substance Abuse and Mental Health Services Administration (SAMHSA), of costs for an 800 telephone line. The 800 line was a preferred access for at least 13 of the grantees members. It provided unlimited access rather than time-limited access. SAMHSA paid for the grantee's predecessor's 800 line over an extended period. "In finding now that the cost is unnecessary, SAMHSA is simply substituting its judgment for that of the Association as to a programmatic matter which is best left to the Association's discretion." See the reasoning of Leventhal, J., in Forsham v. Califano, 587 F.2d 1128, aff'd _____ U.S. ___ (1980). Current Developments 15 PUB. CONT. NEWSL. No. 3, April 1980, p. 4; Forsham Revisited, 18 PUB. CONT. NEWSL., No. 2, Winter 1983, pp. 7-8.

23. Grants are in principle assistance to the grantee's own program. The grantee normally is and normally should be required to put into the project some of its own resources. This is generally referred to as cost-sharing. Symbolically, this is an assurance that the program is indeed the grantee's program. Practically, this helps to assure prudent management.

24. For the same reason, the grantee normally is and normally should be required to continue to put into the project the same effort and funds that it had been using before federal funds became available to it. This is often referred to as an obligation to 'supplement not supplant' and to 'maintain the effort' it had already been making. These are two separate concepts, but are often confused. The appropriate distinction and some appropriate exceptions are discussed below. See, Mason, *Drafting Federal Grant Statutes*, (ACUS) STUDIES IN ADMINISTRATIVE LAW AND PROCEDURE 90-1, esp. at 53-55.

25. Because the grant is intended as assistance and not as a procurement, the grantee is generally free to drop the program, returning, however, funds received and not already committed to the grant purpose. In a contract, by contrast, the contractor is not generally free to drop the program. If it does, it may be liable (for consequential damages to the government. In a grant, the government is not generally free to drop the program. In a contract, it is: *See citations ¶ 10, supra.*

Note: The foregoing paragraphs 4-25 largely paraphrase earlier discussion of the same topics in, *Mason, Current Trends in Federal Grant Law,* 35 FED. BAR J. 163 (1976); *Mason, Administrative Review of Performance, Payment and Termination Controversies*, in ABA National Institute, APRIL 21-22 and May 11-12, 1977 "FOCUS 77, Public Contracts and Grants from Local and Federal Perspectives; *Mason, Current*

Developments, in PUB. CONT. NEWSL, quarterly Vol. 14-29, 1978-1994 (on file in the library of the Department of Commerce); *Mason, Drafting Federal Grant Statutes: Studies in Administrative Law and Procedure 90-1; Mason, Highlights, in FEDERAL GRANT LAW* (M. Mason ed.) (ABA); Dembling and Mason, *ESSENTIALS OF FEDERAL GRANT PRACTICE* (ALI-ABA)

26. The relationship of the grantor is primarily with the direct recipient. If the indirect beneficiary makes a claim against the grantor, the grantor will normally successfully defend on the ground of lack of privity.

27. The ultimate purpose of a grant may be for the direct grantee to use the funds given it to assist beneficiaries. The rights of such intended beneficiaries are not at present matters of clear law.

28. What authorization is needed for a grantee to make a subgrant. Tentative answer: The authority will usually be obvious from the nature of the grant.

29. Consequences of grantee's non-conforming with grant conditions or unauthorized use of grant funds (sanctions). See e.g., *Drafting Federal Grant Statutes*, 125-126 and n.156.

Recovery of improper expenditures or charges. *Maine Department of Administrative and Financial Services*, HHS DAB Docket Nos. A-96-84, A-93-99, Decision No. 1659, May 4, 1998; *Tohono O'Odham Nation*, HHS DAB Docket No. A-97-54, Dec. No. 1646, Feb. 9, 1998.

Suspension (appropriately used procedurally, NOT as a punishment but as a (fact-finding) preliminary to termination or debarment.

Termination by the grantor, for cause. See, *Action for Youth Christian Council, Inc.*, HHS DAB Docket No. A-96-191 Dec. No. 1651, March 12, 1998, esp. at 4.

Refusal of Renewal: *Action for Youth Christian Council, Inc.*, *supra*.

Debarment. See HHS DAB *Research Integrity Adjudications Panel*, Kimon J. Angelides, PhD, Docket No. A-97-98, Decision No. 1677, February 15, 1999, esp. at 4-7 and 163-165; Arie Oren, M.D., HHS DAB *Civil Remedies*, CR490, App. Div. Docket No. A-98-2 Dec. No. 1650, March 4, 1998.

Civil Money Penalty. See *Lake City Extended Care Center*, HHS DAB *Civil Remedies*, CR494, App. Div. Docket No. A-98-13, Dec. No. 1658, April 29, 1998.

30. Administrative appeals. See, e.g., *Drafting Federal Grant Statutes* 126; ESSENTIALS, Ch. 16; Mason, How to Prepare for a Dispute Resolution Proceeding, 7 ASSISTANCE MGT. J., No. 5, Spring 1995, 21.

31. Court review. See ESSENTIALS, Ch. 17; Mason & Dembling, Federal Grant Litigation, 30 THE PRACTICAL LAWYER, No. 7, Oct. 15, 1984, 55.

32. Alternative Dispute Resolution. See the forthcoming Manual by the Public Contracts Section ADR Committee; see also, Administration for Children and Families Program Instructions on mediation procedures. From its inception, the HEW Departmental Grant Appeals Board (now HHS Departmental Appeal Board) has considered the encouragement of alternative dispute resolution as part of its mission. ESSENTIALS § 19.03(b).

33. Some desirable statutory provisions: Standard definitions; normative default rules for sanctions; maintenance of effort, non-supplant; encouragement of administrative appeals boards and ADR.(power of grantor to waive counter-productive rules). See *Drafting Federal Grant Statutes*, 126.

    Pooled draw downs.

34. Some undesirable statutory provisions (e.g., Cabinet level authority for combining grant programs or for waiving grant rules). Many well-intentioned bills have been introduced in Congress providing for such cabinet level authority. This will not work. See "*Environmental Justice*", Current Developments, 29 PUB. CONT. NEWSL. No. 3, Spring 1994, p. 11; also "*Creating A Government That Works Better & Costs Less*," Vol. 29, No. 2, p.15, and review of Kirby article, ibid, p.16.

    Requiring disclosure of research data.
    Requiring "competition". See ¶ 9, supra.

Some Suggestions on How to Fix It.

What's broke?

Grant statutes are often badly drafted. Among the reasons for this is that they are often drafted by spokesmen for a specific purpose who do not have a broad perspective on the operation of grants generally. Grant statutes are often written as though each was the first of its kind. Another reason for their poor draftsmanship is that, unlike contract statutes, grant statutes are usually not subjected in their drafting to the criticism of sophisticated lobbyists. The emphasis of outside review is more likely to be substantive

goals and dollar amounts than technical draftsmanship. These and some other reasons for bad drafting are discussed in DRAFTING, passim, but especially, e.g., at 12-19, 69-72.

A. **Lack of appropriate definitions**.

Words are often dropped into grant statutes with no recognition that their meaning may be the crux of serious debate. The Education for the Handicapped Act seeks to assure free appropriate public education of the handicapped. The key question is what is appropriate. The statute does not define 'appropriate' except in terms of appropriate. See *Board of Education, etc. v. Rowley*, 458 U.S. 172, 102 S. Ct. 3034 (1982). DRAFTING, 17-18. The Social Security Act, Title 19, gives rise to differences of interpretation about the terms 'expended' and 'overpayment' involving many states and millions of dollars. The term 'expended' is not defined, and the term 'overpayment' is not defined or not explicitly defined. DRAFTING, 66-67. The Job Training Partnership Act uses the term recipient in several section, each time with probably a different meaning. DRAFTING, 67-68. Of course, ambiguity is sometimes intentional, but it should be avoided where possible.

How to fix it. First, we urge Congressional proposers of grant statutes not to rely only on general professional drafting staffs, but to involve (early, not at the last minute) staff with grant experience, and staff of grant agencies. See DRAFTING, 123-4. Second, we urge enactment of a general grant statute that will govern definitions and rules where a grant statute does not expressly reject them. Ibid. 125. Third, we recommend more thoughtful statutory provisions on findings and purposes, that may help in interpreting terms not adequately defined. Fourth, we urge that a training course be offered to Congressional staff on the problems of grant statute drafting.

B. **Self-defeating goals.**

Congress often gives conflicting orders to agencies. Attract new industries and expand old ones in areas of low employment BUT NOT subsidize competitors against industries in the area. DRAFTING, p. 10. (Economic Development) Provide both access of students and their parents to school records AND protect their privacy. Ibid, 11. (Family Educational Rights and Privacy Act). Even where the inconsistencies are more apparent than real, the perception of inconsistency interferes with the implementation of the Congressional purpose and may breed mischief among those who would prefer to thwart that purpose.

How to fix it. Very difficult. One help would be explicit statements of findings and purposes, which might indicate priorities and afford a basis for administrative interpretation resolving such conflicts. Another important help would be a broad grant of waiver and interpretive authority to the administering agency in the grant statute or better, in a general grant statute. cf. ibid, 45, 60, 74-78, 126.

C. **Unnecessary and inappropriate variations**.

Grant statutes too often invent unnecessary variations of technical terms, creating problems. DRAFTING, 69-70.

Example: Grantees are often required to 'maintain' the level of spending they have spent for the purposes of the program before receiving grant assistance. This is generally appropriate. It has a purpose similar to the also usual requirement of non-federal share, but is not the same requirement. Grantees are often required to 'supplement not supplant' effort they would have exerted without grant assistance. This is again another requirement with a similar purpose, but it is a different requirement. It is largely precatory, but it has teeth, mainly at the inception of a project where the planning (and approval) of a realistic budget may disclose whether the grantee is supplementing previous effort or simply using the new federal funds to supplant what it would have done. Too often, statutes are written with only a vague sense of the meaning of these requirements, resulting in confusing and uncertain mixtures. See ibid, 51-55.

How to fix it. This problem is hard to fix but may be helped by a general statute defining these terms and the basic rules that are applicable. Such a statute would control any statute not expressly rejecting it, and would make unnecessary, and thus discourage, ignorant inventiveness.

D. **Failure to set appropriate default conditions**.

Grant statutes often fail to give answers to questions that frequently arise in grant administration: Authority to make sub-grants? flow-through of grant rules to sub-grantees and contractors under grants? federal preemption? last dollar provisions? See DRAFTING, e.g., 83-88.

How to fix it. Again, this is hard to fix. The goal is to improve the grant awareness of congressional draftsmen. A solution would be a training course for Congressional staff, if appropriate staff member would attend. Perhaps we should send to every Congressional office an inquiry: if such a course were offered, would your staff attend? Perhaps this Committee or NGMA or some government organization could be persuaded to offer it to Executive personnel and to such Congressional staff as would wish to participate. Some costs might be involved. If not the Federal Executive Institute, are there other possible sources of modest funding?

E. **Self-defeating administration**.

That bureaucrats can be stupid and can fail to distinguish means from ends is not news. It is sometimes difficult for administrators to learn that the hundred tricks are easy to learn. The one principle is hard to learn, namely that the rule should stop when the

reason for the rule stops. And that grants are, most often, intensely involved with the lives of people. See Mason, *Monitoring Grantee Performance*, in ABA Section of Public Contract Law, Federal Grant Law (1982) 81-82.

Example: HEW once thought it was required to impose a sanction to a state that failed to make timely inspection of Medicaid facilities when severe storms had created a state of emergency and road travel was impossible. HEW DGAB Ohio Department of Public Works, Docket No. 78-50-OH-HC, Decision No. 66, October 10, 1979, pp. 3-5. DRAFTING, p. 76.

Another Example: See paragraph 9D *supra*: HEW proposed to shut down a nursing home, ousting old, sick, disabled patients who were happy there, although HEW itself, not the patients and not the nursing home were at fault. This plan was based on an over-literal reading of a statute.

Another Example: Under a statute intended to assist the education of children in low income areas (Title I, Elementary and Secondary Education Act of 1965), the Office of Education (not yet a Department) persisted against explicit Congressional objection in funding preferentially affluent counties with no more than 5% low income children, while excluding schools with 25-30% Title I children. DRAFTING, 43-44; Current Developments, 20 PUB. CONT. NEWSL., No. 4 Summer 1985, "Education Against", p. 17: "When Congress says 'don't eat the grass, you fool' OE eats the daisies".

On the other persistent unreasonable interpretations by the Office or Department of Education, and by the Health Care Finance Administration, See Current Developments, PUB. CONT. NEWSL., "Is HCFA Unreasonable?', Vol. 26, No. 2, Winter 1991, 16-18; "Is HCFA Reasonable?", Vol. 27, No. 4, Summer 1992, 22-23; "The Department of Education, Wrong Again", Vol 20, No. 4, Summer 1985; "Recovery / of Grant Funds Misspent or Accounted for Improperly", Vol. 25, No. 1, Fall 1989, at 10.

How to fix it. Again, difficult. Bureaucrats, like legislators, do not really like to be corrected. See, for example, "Who Will Educate the Educators?, Current Developments, Vol. 20, No. 4, Summer 1985, 15: "When the Congress called on the Office to tighten up its practice, the Office sulked and proceeded to enforce rules with blind fidelity to the letter that kills. In the labor field, this is called a rule-book action." Nevertheless, an approach that may perhaps be helpful would be more and better use of decisions of independent grant appeals boards (OE unfortunately no longer has one). This use should be not only for the outcomes of cases, but for identification of trouble spots in administration. When appeals are taken in good faith, whether they are sustained or not, they may tell us that either administration is defective or communication with grantees is deficient. Once a year, a grant agency should be encouraged to review all appeals from that point of view. DRAFTING, 126-7; ESSENTIALS, Sec. 15.10; Current Developments, 26 PUB. CONT. NEWSL., No. 2, Winter 1991, "Appeal Board Feedback

Inadequately Used", p. 16. [Ed Levin suggests an Inter-Agency Board. Experience raises doubts about that solution].

F. **Insufficient Support for Informed Appeals Processes and ADR**.

See Paragraph E, How to fix it. The problem here is not no support, but insufficient support. The outstanding example of a grant appeals board is the HEW DGAB (HHS Appeals Board). It does not have a statutory basis. It has had excellent support from some Secretaries and some General Counsel, and poor support from others. Energy has a working Appeals Board that wears both a contract fedora and when needed, a grant beret. EPA had a good grant appeals board and abolished it, probably because the administrators did not like to be found wrong.

Education had a Board and now uses ALJs. Alternative Dispute Resolution is encouraged by statute, but is not sufficiently used.

How to fix it: More Appeal Boards, more independence, and more utilization of lessons learned from cases before the Boards. *See* paragraphs E and F, *supra*.

G. **Uninformed decisions**.

Statutory and administrative rules are sometimes written unnecessarily imposing State procedures contrary to the Constitution of the State or the regular practices of the State, or on other organizations, practices contrary to the regular and preferred practices of the organization. Formulas are sometimes adopted calling for data that may not be available or that may be unreliable for the purpose intended. DRAFTING, 75, 82-3, 93, 98.

How to fix it. How do you cure ignorance or improvidence? Once again, the only promising remedy may be a training course. See paragraph D, *supra*.

H. **Unnecessary fragmentation**.

There are more separate grant programs than there need be. See, for example, Current Trend, 172-174: Four separate programs encouraged educationally disadvantaged students. "Four separate recruiters worked the same streets of the cities, talking to the same kids on the same corners" (once urging them, if they haven't gone to college, promising help, one, to go on to law school, one to try nursing, one Allied Health professions). Why not a single recruiter, informed about all four programs?

Several approaches for combating excessive fragmentation have been tried: Community Action has been deprived of Viagra. Block grants have accomplished some consolidation, but much less than touted. General Revenue sharing - R.I.P. Joint Funding

hasn't worked, partly because of unimaginative use and lack of sufficient waiver authority.

How to fix it. The most promising approach is again a general grant statute giving broad authority to agency heads to combine programs, waiving detailed rules that unnecessarily prevent consolidation. [Note: Ed Levin says, NO! We need bureaucratic incentives to cooperate not more legislation. (We do need such incentive, but more legislation of the right kind may preempt more legislation of the wrong kind)].

CONCLUSION

"Most federal grant programs reflect a recognition that state and local governments have failed to respond to a need. Simply shoving these responsibilities back to the States is not likely to work. Indeed, state and local governments are often motivated to operate against the national interest which is reflected in grant programs. In making the major shake-ups that are required, thoughtful consideration of the paradox of the commons is important. Current Developments, 16 PUBLIC CONTRACT NEWSLETTER No. 4, July 1981, p. 8, The Paradox of the Commons. In bringing about consolidations, attention to the fair treatment of different parts of the states is needed. Id 17 PUBLIC CONTRACT NEWSLETTER No. 2, January 1982, p. 12.

"In brings about more efficient administration of programs, there is needed better articulation of program goals, better perspective on system contexts in which programs occur, better training of administrators, better communication, better monitoring, better feed-back, and more broadly conceived administrative appeals process. A Non-Partisan Agenda on Grants for the Next Administration, 16 PUBLIC CONTRACT NEWSLETTER No. 2, January 1981, p. 4-6; 15 PUBLIC CONTRACT NEWSLETTER No. 4, July 1980, on the failure of OMB (still operative) to develop guidance on dispute resolution: 15 PUBLIC CONTRACT NEWSLETTER No. 2, January 1980."

"Above all, a clear recognition of where the federal role is desirable is needed as a corrective to blind devolvement back to States. 14 PUBLIC CONTRACT NEWSLETTER No. 2, January 1979, p. 15-16.

We favor ...increasing the role of state and local governments, improving the administration of all programs. What we urge is that these goals be sought in a manner that is illuminated by an understanding of the real operation of such programs and not in response to catch-phrases." Current Development, PUBLIC CONTRACT NEWSLETTER, Vol. 17, No. 3, Spring 1982, 2.